third person, of the "sole beneficiary" type.[8] Such an agreement is in reality a contract to make a gift. Since someone else has furnished the consideration, the transfer is "beneficent and donative," even though the beneficiary can enforce it; and there is no reason why a gift of this kind should not be as clearly subject to the tax as any other.

This result, moreover, seems correct on principle. The New York transfer tax is a tax on the right to receive the property of the decedent.[9] It is levied on the amounts received by individual beneficiaries, not on the estate of the decedent as a whole.[10] It is reasonable, therefore, to require that if a transfer is to be free from taxation because consideration has been given for it, the consideration must move from the beneficiary. If he has given nothing, it is not unfair that his succession should be taxed.

It must be admitted that there is some authority against the view advanced here. There is one case directly in point [11] which supports the decision of the Appellate Division; but it was decided in the Surrogate's Court, and its authority is not binding. The cases which hold that a party to an antenuptial agreement may take under it tax free [12] are not in point, since the consideration moves from the one who receives the benefit.[13] The strongest support for the principal case is to be found in the life insurance cases. A contract of insurance, where the policy is payable to a beneficiary, is a contract for the benefit of a third person, of the same type as the agreement in *Matter of Schmoll.* The receipt by the beneficiary of the proceeds of such a policy is not taxable.[14]

The argument by analogy from these cases is strong. But the law of inheritance taxation is still somewhat confused, and reliance on analogies is dangerous. It is submitted that a development of the law along the lines laid down in *Matter of Orvis* will most nearly achieve the legitimate purpose of the statute.

FORFEITURE OF AUTOMOBILE SEIZED WHILE CARRYING INTOXICATING LIQUOR. — Effective enforcement of the law sometimes requires legislative enactments making property, itself illegal or used for illegal purposes, subject to forfeiture. This power has been freely exercised by

[8] See 1 WILLISTON, CONTRACTS, § 357.

[9] See Matter of Penfold, 216 N. Y. 163, 167, 110 N. E. 497, 498 (1915). See GLEASON AND OTIS, INHERITANCE TAXATION, 2 ed., 694.

[10] See 1909 NEW YORK LAWS, c. 62, § 243, as amended by 1910 LAWS, c. 706; CONSOL. LAWS, c. 60, art. 10. There is an exemption of $5,000 on the succession of certain individuals, and the rate of taxation varies according to the relationship of the beneficiary to the decedent. See 1909 NEW YORK LAWS, c. 62, §§ 221, 221 a, as amended by 1916 LAWS, c. 548; CONSOL. LAWS, c. 60, art. 10.

[11] Matter of Demers, 41 Misc. (N. Y.) 470, 84 N. Y. Supp. 1109 (1903).

[12] Matter of Baker, *supra;* Matter of Vanderbilt, 184 App. Div. 661, 172 N. Y. Supp. 511, aff'd 226 N. Y. 638, 123 N. E. 893 (1919).

[13] Under the doctrine of Matter of Orvis, *supra,* the transfer might be taxable in spite of this, if it were in fact donative. Whether it is or not does not concern us.

[14] Matter of Elting, 78 Misc. (N. Y.) 692, 140 N. Y. Supp. 238 (1912); Tyler *v.* Treasurer and Receiver General, 226 Mass. 306, 115 N. E. 300 (1917). The distinction that in the life insurance cases the payment is made by the insurer, and not out of the estate of the decedent, is not important. The beneficiary gets from the decedent's contract a right to the proceeds, and this right takes effect in enjoyment after the decedent's death.

Congress, notably against property used to evade the internal revenue laws.[1] A similar provision has been incorporated in the prohibition laws of many of our states and is now found in the Volstead Act for the enforcement of nation-wide prohibition.[2] It is usually provided, not only that all intoxicating liquors shall be forfeit, but also that any automobile or other vehicle carrying such liquor shall be seized and, after condemnation proceedings, shall be sold for the benefit of the public treasury.

Within the past few years numerous cases have arisen in the state and federal courts involving the extent of this liability to forfeiture under the various statutes in force — deciding, for example, whether the rights of an owner or mortgagee ignorant of the offense may be prejudiced by the forfeiture.[3] Each case presents, primarily, a question of statutory interpretation, but there is some diversity of opinion as to the principles of construction proper to apply. Some courts hold that these statutes, being remedial, should be liberally construed according to the intention of the legislature.[4] If the policy behind the enactment of a statute is effectively to curb violation of the law, doubts should be resolved in favor of the government, even though this construction works hardship. Some courts, on the other hand, laying emphasis upon the criminal nature of these proceedings, adhere to the general rule that criminal statutes should be construed strictly.[5] An act involving a penalty or forfeiture should be interpreted in favor of the owner of the chattel. The latter seems the better view; if the legislature feels that a harsh rule is expedient, it should expressly so provide.

Two methods of approach should be distinguished. The first is one based upon the fact that, procedurally, actions for condemnation are usually civil actions, strictly *in rem*.[6] In accord with this, the courts have adopted a theory similar to that which obtains in admiralty law;[7] viz., that the property itself is the offender.[8] If one were to adopt the premise that the chattel is really the offender, it would naturally follow

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[1] Dobbins Distillery *v.* United States, 96 U. S. 395 (1877); United States *v.* One Bay Horse and One Buggy, 128 Fed. 207 (1904). (See U. S. REV. ST. §§ 3450, 3453; 13 STAT. AT L. 240; 14 STAT. AT L. 111, 151.)

[2] See 41 STAT. AT L. 315. This section provides for forfeiture of a vehicle only after conviction of the person who was in charge, and subject to all *bona fide* liens held by innocent persons. In view of the argument advanced in cases arising under stricter statutes, that such leniency would render a statute practically ineffective because of the chance for fraud, it will be interesting to watch the cases which are certain to arise under the Volstead Act.

[3] One Packard Automobile *v.* State, 86 So. 21 (Ala.) (1920); Matson & Healy *v.* State, 103 S. E. 37 (Ga.) (1920); United States *v.* One Buick Roadster Automobile, 244 Fed. 961 (1917).

[4] United States *v.* Stowell, 133 U. S. 1 (1889); United States *v.* One Saxon Automobile, 257 Fed. 251 (1919).

[5] Skinner *v.* Thomas, 171 N. C. 98, 87 S. E. 976 (1916); United States *v.* One Cadillac Eight Automobile, 255 Fed. 173 (1918).

[6] See U. S. REV. ST., § 3453, *supra*. This is illustrated by the names of the majority of these cases, wherein the chattels to be condemned stand as defendants; *e.g.*, United States *v.* Two Barrels of Whisky, 96 Fed. 479 (1899).

[7] The Palmyra, 12 Wheat. (U. S.) 1 (1827); Brig Malek Adhel *v.* United States, 2 How. (U. S.) 210 (1844).

[8] Dobbins Distillery *v.* United States, *supra;* United States *v.* Two Bay Mules, 36 Fed. 84 (1888); United States *v.* One Buick Roadster Automobile, *supra*.

that so soon as a "guilty" chattel is found the inquiry need go no further, and one need not consider the rights of innocent owners or mortgagees.[9] The test of such "guilt" in the case of vehicles is sometimes fixed as the "guilty knowledge of the person in charge," [10] but this remits us to a consideration of the personal element and brands the whole doctrine as a patent fiction. The logical result of the fiction would be the harsh rule that an innocent owner whose automobile had been stolen without any fault on his part, and used by the thieves for carrying intoxicants, would have no standing to prevent the forfeiture of the car, but it seems that the courts are hesitant about going to this length.[11] In some cases, however, there are intimations that if a statute specifically provided for such a forfeiture of stolen property, such a statute would, as a matter of course, be valid.[12] But it seems clear that the question of constitutionality would arise in such a case, for surely the courts would not carry their conception of the "guilty" chattel so far as to hold that the chattel, rather than its owner, is punished by a forfeiture.

The second method of approach is sounder because more in accord with the facts. It recognizes that chattels do not offend,[13] and that if such forfeitures are justified it is as penalties necessarily inflicted upon the owner.[14] If the legislation has a tendency to enforce obedience to the law and is reasonably necessary for this purpose, and if it gives a chance to all persons interested to defend in court,[15] it is a reasonable exercise of the police power and does not take property without due process of law.[16] The forfeiture is the owner's misfortune, much as if the property had been destroyed, and he is reduced to his remedy against the wrongdoer.[17] As suggested above, if a statute should expressly call for the forfeiture of property which had been stolen, an interesting question of constitutionality would arise.[18] In this case it would obvi-

[9] This is curiously reminiscent of the noxal liability of Roman law, and the common law deodand. See HOLMES, COMMON LAW, 7–11, 17–25.

[10] Landers *v.* Commonwealth, 101 S. E. 778 (Va.) (1919).

[11] Peisch *v.* Ware, 4 Cranch (U. S.), 346 (1808). See United States *v.* One Saxon Automobile, *supra*, 252.

[12] See White Automobile Company *v.* Collins, 136 Ark. 81, 83–84, 206 S. W. 748, 749 (1918).

[13] Vaughan, C. J., in Sheppard *v.* Gosnold, Vaugh. 159, 172 (1672), said: "Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are."

[14] See Boyd *v.* United States, 116 U. S. 616 (1885), holding that in substance such proceedings are "criminal proceedings."

[15] Two cases from New York emphasize the fact that a statute providing for forfeiture without notice is unconstitutional. The first holds a portion of the Liquor Tax Law to be void, on this ground. Clement *v.* Rabbach, 62 Misc. (N. Y.) 27, 115 N. Y. Supp. 162 (1909). The second holds that an amendment to that law, so as to give notice to persons interested and afford a chance to defend, sufficiently protects the rights of an innocent owner. Farley *v.* Liquors Seized, 80 Misc. (N. Y.) 32, 141 N. Y. Supp. 696 (1913).

[16] Kansas *v.* Ziebold (Mugler *v.* Kansas), 123 U. S. 623 (1887); Robinson Cadillac Motor Car Company *v.* Ratekin, 177 N. W. 337 (Neb.) (1920).

[17] See United States *v.* Two Bay Mules, *supra*, 85.

[18] In Buchholz *v.* Commonwealth, 102 S. E. 760 (Va.) (1920), the person in charge of the automobile when it was seized was technically a thief, and the court held that in spite of the owner's freedom from guilt the car was subject to forfeiture; but it distinguished the case from one of out-and-out theft on the ground that the owner had trusted the thief, his chauffeur, with the custody of the car. In such a case it can be

ously be contended that the legislation would be unconstitutional because it would not have a reasonable tendency to accomplish the purpose aimed at.[19] Enforcement of the law would not be materially contributed to by this provision, which would, upon its face, work unmerited hardship. In short, the matter is one for the sound discretion of the legislature, acting within the bounds of reason. It is at any rate clear that an owner of property who has voluntarily given up possession, or otherwise facilitated the illegal use, has no constitutional protection against a forfeiture.

ACCEPTANCE UNDER PROTEST OF RENT ACCRUING AFTER CAUSE FOR FORFEITURE OF A LEASE. — Where cause for forfeiture of a lease has arisen and the tenant subsequently offers rent accruing after the forfeiture, what should the landlord do to preserve his rights to recover the premises? If he accepts the rent as such, with knowledge of the cause for forfeiture, it is well settled that his very acceptance affirms the continuance of the lease and bars his suit upon the breach.[1] Must he therefore refuse the money altogether, or may he take it on a stipulation that he is receiving it not as rent but as compensation for use and occupation in the interim? The authorities on this point are by no means unanimous. The earlier cases originated in a *dictum* of Lord Mansfield's [2] that the determining factor was the landlord's attitude of mind, and that this was a question of fact for the jury.[3] Each case thus goes on its own merits, and the landlord will preserve his right to recover possession if he makes it sufficiently clear that he does not recognize the tenancy as still existing when he accepts the money. This seems to be law to-day in at least four states,[4] though there is but one case on the exact point.[5] Later English cases inclined to treat the question not as one of fact, but as independent of the subjective intent of the landlord. Thoroughly

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argued that the owner, though guiltless, has voluntarily assumed a risk. The tendency is to draw the line here. For the facts of this case, see RECENT CASES, p. 212, *infra*.

[19] Minnesota *v.* Barber, 136 U. S. 313 (1890).

[1] Pennant's Case, 3 Co. 64a (1596); Conger *v.* Duryee, 90 N. Y. 594 (1882); Ohio Valley Oil Co. *v.* Irvin Co., 184 Ky. 517, 212 S. W. 110 (1919). A suit by the landlord for rent has been held to have the same effect. Dendy *v.* Nicholl, 4 C. B. N. S. 376 (1858). Nasby Bldg. Co. *v.* Walbridge, 6 Oh. App. 104 (1916), *contra*. A mere demand for rent does not bar the landlord's right of re-entry. Blyth *v.* Dennett, 13 C. B. 178 (1853). *Cf.* Camp *v.* Scott, 47 Conn. 366 (1879).

[2] See Doe d. Cheny *v.* Batten, 1 Cowp. 243, 245 (1775).

[3] Goodright d. Charter *v.* Cordwent, 6 T. R. 219 (1795); Prindle *v.* Anderson, 19 Wend. (N. Y.) 391 (1838); Blyth *v.* Dennett, *supra*.

[4] Manice *v.* Millen, 26 Barb. (N. Y.) 41 (1857); Fitzpatrick *v.* Childs, 2 Brewst. (Pa.) 365 (1866); Medinah Temple Co. *v.* Currey, 162 Ill. 441, 44 N. E. 839 (1896). See Doe d. Stedman *v.* McIntosh, 5 Ired. L. (N. C.) 571, 574 (1845).

[5] Fitzpatrick *v.* Childs, *supra*. Certain cases are to be explained on the ground that the money was not for rent that had accrued after the breach, or after the expiration of a notice to quit. Kimball *v.* Rowland, 6 Gray (Mass.) 224 (1856); Miller *v.* Prescott, 163 Mass. 12 (1895); Lindeke *v.* Associates Realty Co., 146 Fed. 630 (1906). *Cf.* also Sixth Avenue Realty Co. *v.* Zeiler & Co., 156 N. Y. Supp. 372 (1916) (express stipulation in lease safeguarding landlord in receiving rent from an assignee); Fleming *v.* Fleming Hotel Co., 69 N. J. E. 715, 61 Atl. 157 (1905) (receiver in temporary possession).